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Nos. 82-524, 82-545, 82-551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BALTIMORE GAS AND ELECTRIC CO., *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondents.

UNITED STATES NUCLEAR REGULATORY COMMISSION AND
UNITED STATES OF AMERICA,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

COMMONWEALTH EDISON CO., *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF RESPONDENT PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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BRIEF OF RESPONDENT PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Respondent Pacific Legal Foundation[1] submits this brief in support of the petitioners in these consolidated cases. The reasons for reversing the decision of the Court of Appeals have been fully set forth by the petitioners; the purpose of this brief is to draw attention to one important aspect of the lower court's action—its ruling that agency action in the face of scientific uncertainty is, in effect, per se illegal.

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[1] Pacific Legal Foundation is a nonprofit organization incorporated in California. It has no parent companies or subsidiaries, but it is affiliated with the College of Public Interest Law, a fellowship program for law school graduates.

SUMMARY OF ARGUMENT

The Court of Appeals' invalidation of the Nuclear Regulatory Commission's (NRC) zero-release assumption is couched in the language of the traditional arbitrary and capricious test for agency rule making. In fact, however, it establishes a per se rule against administrative action if there is uncertainty regarding the facts underlying the agency's decision.

NRC fully considered the issue of scientific uncertainty concerning the performance of future nuclear waste repositories. Rather than deal with NRC's reasoning, the court attempted to simply refute it by picking through the record for evidence which was supposedly contrary to NRC's decision. This reweighing of the evidence was unfounded, especially in light of the high degree of judicial deference which is owed to an agency's predictive judgment. The court's restriction on NRC's substantive decision making is no more valid than the procedural restrictions which this Court overturned when it previously reviewed this case.

ARGUMENT

THE COURT OF APPEALS HAD NO BASIS FOR IMPOSING WHAT AMOUNTS TO A PER SE RULE THAT FORBIDS ADMINISTRATIVE ACTION IN THE FACE OF UNCERTAINTY

The Court of Appeals ruled that NRC's zero-release assumption regarding nuclear waste repositories was arbitrary and capricious. Opinion below, 685 F.2d 459, 478-85 (D.C. Cir. 1982), appendix to petitions for certiorari (Pet. App.) 1a, 34a-49a.[2] This ruling was the key to the court's invalidation of NRC's Table S-3 Rules.

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[2] The appendices to the petitions for certiorari in No. 82-524 and No. 82-551 are nearly identical to each other. The page references given for Pet. App. are thus applicable to either one of these appendices.

As is shown below, this decision essentially creates a per se rule against agency action in the face of uncertainty.

The court identified the basis of NRC's zero-release assumption as the agency's "prediction that technology would be developed by which to isolate long-lived wastes from the biosphere indefinitely." 685 F.2d at 480, Pet. App. at 39a. The question should then have been whether such an approach was reasonable. That question cannot be answered merely by pointing to contrary evidence in the record, yet this is precisely what the court did. It pointed to the evidence on uncertainties contained in the testimony of a United States Geological Survey scientist, in the Interagency Review Group study (IRG Report), and in the NRC's staff report, NUREG-0116. 685 F.2d at 480-81, Pet. App. at 40a. Even if this evidence were contrary to the NRC's zero-release assumption, it would not suffice to make that assumption unreasonable:

> "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966) (citations omitted).

In fact, however, NRC viewed this evidence as supporting rather than contradicting its decision. While the witness from the Geological Survey noted the "considerable uncertainty" over repository releases, he also stated that he "believe[s] it is possible" that locations will be found for repositories whose releases will be at the low levels estimated by the NRC staff. Joint Appendix (J.A.) at 190. NRC cited this testimony in its decision on the final rule. 44 Fed. Reg. 45,362, 45,368 col. 2 (1979), Pet. App. 341a, 366a.

Similarly, while the court pointed to the IRG Report as an indication of NRC's arbitrariness, the agency viewed it as consistent with its own judgment:

> "The Commission believes the IRG Report's view that suitable sites can be identified but that uncertainty about repository performance cannot be entirely eliminated is consistent with the record compiled in the fuel cycle ruelmaking." 44 Fed. Reg. 45,368 n.24, Pet. App. at 367a.

This was also the case with NUREG-0116, which characterized the waste disposal system examined by the NRC staff as "a realistic and likely system" and described the analysis of that system's elements as "conservative to the best of our ability today." *Id.* at 1-4. This study too was explicitly relied upon by NRC in its decision. *See, e.g.*, 44 Fed. Reg. 45,368 nn.21-22, Pet. App. at 365a-66a.

NRC had thus evaluated this evidence and found that it supported the Table S-3 Rules. It was not the court's function to "reweigh the evidence or reject reasonable agency inferences simply because other inferences might also have been reasonably drawn." *Laird v. Interstate Commerce Commission*, 691 F.2d 147, 150 n.4 (3d Cir. 1982) (citations omitted). Yet the court did precisely this. It took the uncertainty which NRC had acknowledged and flatly declared that in the face of "such uncertainty . . . the zero-release assumption, taken as a finding of fact, cannot stand." 685 F.2d at 481, Pet. App. at 42a.[3]

While the court never explained just why the zero-release assumption could not stand in the face of that uncertainty, NRC fully explained why it could. The agency stated that it had conservatively assumed that gaseous fission products would be released before a repository was sealed; the "numbers in Table S-3 reflect this assumed complete release." 44 Fed. Reg. 45,368 n.20, Pet. App. at 365a. It determined that the stable geological history and physical nature of bedded salt repositories

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[3] The assumption fared no better when the court analyzed it as a decision-making device. *See* 685 F.2d at 485, Pet. App. at 49a.

minimized the possibility "of intrusion by nature or by humans." *Id.* at col. 2, Pet. App. at 366a. It found that the effect of any water intrusion which might occur would be further minimized by natural barriers contained in the repository. *Id.* Finally, NRC concluded that the evidence "favors the view" that suitable repository sites will be located. *Id.* at col. 3, Pet. App. at 366a. On this basis, and in light of "the limited purpose of the fuel cycle rule" (*id.* at 45,369 col. 1, Pet. App. at 369a),[4] NRC determined that Table S-3 was both reasonable and conservative. *Id.* at cols. 2-3, Pet. App. at 370a.

The standard of review which should have been applied to this judgment is the "highly deferential" arbitrary and capricious test for rule making. *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 34 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976). As this Court stated in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the purpose of that test is to ensure that the agency has engaged in a "consideration of the relevant factors." *Id.* at 416. The test, however, does not mandate that this consideration produce any preordained result, or even a result that is agreeable to the court. While the

> "inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Overton Park*, 401 U.S. at 416.[5]

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[4] NRC explained that, until an explanatory narrative is added to the fuel cycle rule, "the use of Table S-3 in individual proceedings must be accompanied by supplementary presentations" on such issues as the "health effects from fuel cycle releases" and the "cumulative impacts of fuel cycle activities." 44 Fed. Reg. 45,362 col. 3, Pet. App. at 343a-44a. Such issues "remain open for litigation in individual proceedings." *Id.*, Pet. App. at 344a.

[5] As the District of Columbia Circuit has noted, the court is not even empowered under this standard "to embark upon wide-ranging searches for 'clear errors of judgment.'" *Ethyl Corp.*, 541 F.2d at 35 n.74.

Given NRC's explanation of why its decision was not only reasonable but conservative despite the existence of uncertainties, the court's decision to the contrary is precisely such a proscribed substitution of judgment.

The intrusiveness of the court's action is worsened by the "tentative" nature of the evidence before NRC. 44 Fed. Reg. 45,368 col. 2, Pet. App. at 366a. When an agency makes predictions on the basis of incomplete data, its exercise of judgment and use of administrative expertise are entitled to even greater judicial deference than would otherwise be the case. An agency

> "may apply [its] expertise to draw conclusions from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as 'fact,' and the like." *Ethyl Corp.*, 541 F.2d at 28.

Because the agency's decision in such cases "rest[s] on judgment and prediction rather than pure factual determinations,"

> "complete factual support for [its] ultimate conclusions is not required, since 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' [Footnote omitted.]" *Federal Communications Commission v. WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981) (quoting *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)).[6]

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[6] *See also Amoco Oil Co. v. Environmental Protection Agency*, 501 F.2d 722, 741 (D.C. Cir. 1974):

> "Where . . . regulations turn on choices of policy, on an assessment of risks, or on predictions dealing with matters on the frontiers of scientific knowledge, we will demand adequate reasons and explanations, but not 'findings' of the sort familiar from the world of adjudication."

The level of judicial deference owed to such an administrative decision is greater than that normally due:

> "[T]he discretionary authority of the agency is broader, and a finding of its irrationality harder to make, when its decisions are based not on simple, hard facts but on predictive judgments as to the future effects of present acts." *NAACP v. Federal Communications Commission*, 682 F.2d 993, 1003 (D.C. Cir. 1982).

The court, however, summarily overturned NRC's assessment of uncertainties as "either a failure to consider a relevant factor or a clear error in judgment." 685 F.2d at 485, Pet. App. at 49a. As NRC's own decision demonstrates, it was neither; in Judge Wilkey's words, NRC's assessment "was a quintessential *policy judgment*" which was adequately explained and supported. 685 F.2d at 538, Pet. App. at 166a (emphasis in original; footnote omitted).

The court's essential ruling was that

> "[f]or an agency to go forward in the face of significant uncertainty and issue such a rule indicates either a failure to consider a relevant factor or a clear error in judgment." 685 F.2d at 485, Pet. App. at 49a.

While this ruling appears to be simply an application of the arbitrary and capricious standard, other portions of the court's opinion demonstrate that it is nothing of the sort. NRC clearly *did* consider the relevant factor of uncertainty, and the court expressly acknowledged this. *See* 685 F.2d at 481, Pet. App. at 41a. NRC's judgment regarding that factor was *not* a "clear error," and the court claimed that it was not declaring it as such.[7] Under these circumstances, the above ruling is not what it ap-

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[7] The court stated that "we do not decide . . . the reasonableness of the Commission's conclusion that the probabilities favor the zero-release assumption." 685 F.2d at 478 n.96, Pet. App. at 35a. The court's actual decision, however, indicates that it nonetheless did find NRC's conclusion to be unreasonable.

pears to be at all. Rather, it is a categorical prohibition on agency action in the face of uncertainty. The court has declared, in effect, that it is illegal "for an agency to go forward in the face of significant uncertainty" *no matter what its reasons for doing so.*

There is no basis in law for this judicial restriction on agency decision making. "[A]n administrative agency's discretion is the power to make a reasoned choice of alternatives within a class of permissible actions." *Pillai v. Civil Aeronautics Board*, 485 F.2d 1018, 1030 (D.C. Cir. 1973). The court has given no reason for removing administrative choices made in the face of uncertainty from the class of permissible actions.[8] Its restriction of NRC's power to make substantive decisions is no more valid than the restriction of NRC's procedural flexibility which this Court overturned when it last reviewed this case. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

CONCLUSION

For these reasons, and for the reasons more fully set forth in the briefs of the petitioners and in Circuit Judge Wilkey's dissent below (685 F.2d at 517-45, Pet. App. at 117a-81a), the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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[8] *Cf. Township of Lower Alloways Creek v. Public Service Electric and Gas Co.*, 687 F.2d 732, 746 (3d Cir. 1982), approving NRC's handling of the issue of water loss from a spent fuel pool as an "event of very low probability."